APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

J.A07020/00
2000 PA Super 90

No. 2668 EDA 1999

CHARLES L. GRIMES,

Appellee,

v.

JAMES W. WETZLER, INDIVIDUALLY, AND MICHAEL H. URBACH, AS TAX COMMISSIONER OF THE STATE OF NEW YORK, PHILIP ZURLO, WARREN BROWN, MARY ANN LINN, AND SUNEIL MEHRA, INDIVIDUALLY AND AS EMPLOYEES OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Appellants.

No. 2718 EDA 1999

CHARLES L. GRIMES,

Appellant,

v.

JAMES W. WETZLER, INDIVIDUALLY, AND MICHAEL H. URBACH, AS TAX COMMISSIONER OF THE STATE OF NEW YORK, PHILIP ZURLO, WARREN BROWN, MARY ANN LINN, AND SUNEIL MEHRA, INDIVIDUALLY AND AS EMPLOYEES OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Appellees.

Appeal from the Decree entered August 16, 1999
In the Court of Common Pleas of Chester County,
Civil No. 93-10226

Before CAVANAUGH, BECK, JJ., and CIRILLO, P.J.E.

Argued Feb. 15, 2000. Filed March 23, 2000.

CIRILLO, P.J.E.:

¶1 Charles Grimes appeals and James Wetzler, Michael Urbach, Philip Zurlo, Warren Brown, Mary Ann Linn, and Suneil Mehra[1] (Appellees/Cross-Appellants) cross-appeal from the final decree entered by the Court of Common Pleas of Chester County. We reverse the order denying preliminary objections and dismiss the case for lack of jurisdiction.

¶2 In November of 1993, Grimes instituted the underlying declaratory judgment action, based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, seeking a declaration that from 1978 and at all times after he was never and has not been a domiciliary[2] of the State of

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[1] Wetzler was sued individually and as Tax Commissioner of the State of New York; Urbach was later added as the new Tax Commissioner of New York. Appellees/Defendants Zurlo, Brown, Linn and Mehra were all sued as employees of the Department of Taxation and Finance for the State of New York. The Department of Taxation and Finance for the State of New York was never named a party in this suit.

[2] Domicile has been defined by this court on many occasions to mean residence in the place where domicile is claimed and an intent to reside permanently in the location. See *Stambaugh v. Stambaugh*, 458 Pa. 147, 329 A.2d 483 (1974). See also *Tax Review Bd. v. Belmont Labs. Co.*, 392 Pa. 473, 476, 141 A.2d 234, 236 (19580) ("Domicile is a place where a person has his true, fixed, permanent home and principal establishment, to which, whenever absent therefrom, he intends to return and continues until another permanent home and principal establishment is acquired."). The domicile of a person is the place

New York. Grimes claimed that Appellees, individually and in their capacity as employees of the New York State Department of Taxation and Finance, improperly assessed him for tax liabilities in excess of one million dollars for the tax years 1962 to 1990. From 1983 to 1990, with the sole exception of 1987, Grimes filed New York resident tax returns. He also took advantage of certain New York tax credits. Grimes, however, claims that he had established Pennsylvania as his domicile in 1978.

¶3 In 1990, the New York State Department of Taxation and Finance began to conduct an audit of Grimes' 1987 tax returns; the audit proceeded through 1992. Both Grimes and his representative were uncooperative in the process.

¶4 In his complaint Grimes asserted that his constitutional rights were violated by New York taxing authority employees whose harassing and arbitrary implementation of taxing guidelines violated his civil rights. Moreover, Grimes contended that his ability to freely travel between Pennsylvania and New York has been hampered because of his inability to determine his

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here he has voluntarily fixed his habitation with a present intention o make it either his permanent home or his home for the indefinite future. To effect a change of domicile there must be a concurrence of two factors: physical presence in the place where the new domicile is alleged to have been acquired, and the intention to make it one's home without any fixed or certain purpose to return to the former place of abode. *Loudenslager Will*, 430 Pa. 33, 240 A.2d 477 (1968); *Publicker Estate*, 385 Pa. 403, 123 A.2d 655 (1956); *Zinn v. Zinn*, 327 Pa.Super. 128, 130-132, 475 A.2d 132, 133 (1984). It is an established principle that domicile, having been shown to exist, is presumed to continue until another domicile is affirmatively proven. *Obici Estate*, 373 Pa. 567, 571, 97 A.2d 49, 51 (1953).

obligations under New York tax laws.[3] Such actions, he contends, entitle him to relief from the past, in the present, and in the future.

¶5 Appellees filed preliminary objections to Grimes' complaint alleging that the trial court lacked personal jurisdiction over them. See Pa.R.C.P. 1028(a)(1). The trial court denied the objections and Appellees then filed a motion for reconsideration of the court's previous order. The trial court granted reconsideration, staying the taking of depositions until proceedings were held on the issue of personal jurisdiction. In his complaint and in opposition to the preliminary objections, Grimes first[4] contended that the trial court had personal jurisdiction over the Appellees/defendants based upon this Commonwealth's long-arm statute, specifically 42 Pa.C.S. § 5322(a)(4) (general jurisdiction over a person whose actions or omissions outside of this Commonwealth have caused harm or injury in this Commonwealth).

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[3] At the time he instituted suit in this Commonwealth, Grimes was involved in administrative proceedings in New York with regard to these same tax assessments. In 1995, after a hearing before the New York State Division of Tax Appeals, Grimes was found to not have been a domiciliary of New York as of 1987. Subsequently, a notice of cancellation of deficiency of taxes for the 1987 tax year was issued.

[4] As an alternative argument to establish the court's personal jurisdiction over Appellees, Grimes asserted in his response to Appellees' preliminary objections that the court also had such jurisdiction generally because of the fact that New York had the authority to tax items purchased in Pennsylvania but shipped to New York. This form of taxation, which he claims takes place daily, established the minimum contacts sufficient to confer Pennsylvania with personal jurisdiction in the present case. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), however, the Court stated that "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." Id. at 299, 100 S.Ct. 559.

After proceedings, the court issued an order denying the Appellees' reconsideration motion, finding that the court did, in fact, possess in personam jurisdiction over the Appellees.

¶6 After an adjudication, the court memorialized its findings of fact, including a discussion and its conclusions of law. The court held that the Appellees were, at most, negligent and that as government officials, they were protected by qualified immunity. Both parties filed post-trial motions which were denied; the court entered a final decree.

¶7 On appeal, Grimes presents the following issues for our consideration:

(1) Should the trial court have granted Defendants' motion to dismiss Plaintiff's complaint for a declaratory judgment that he is, and continuously since 1978 has been, a domiciliary of Pennsylvania?

(2) Should the trial court have granted Plaintiff such a declaration and an appropriate injunction on the evidence presented at trial?

(3) Should the trial court have held that Defendants were not liable for seeking to tax Plaintiff as an asserted New York domiciliary because they were at most negligent and were entitled to a qualified privilege?

¶8 On cross-appeal, the following issues are presented:[5]

(1) Did the trial court err when it denied Defendants' preliminary objections to in personam jurisdiction?

¶9 Before addressing Grimes' issues on appeal, we must first direct our attention to the issue raised by cross-appellants/appellees as it concerns whether the trial court had personal jurisdiction over Appellees in the underlying case.

¶10 In the present case, Appellees filed preliminary objections to Grimes' complaint alleging lack of personal jurisdiction. The trial court denied the objections without filing an opinion. Appellees filed a motion for reconsideration, which was granted. The court held a hearing wherein arguments were made for both sides as to why the court did or did not have personal jurisdiction.

¶11 First, we note that:

"[W]hen preliminary objections, if sustained, would result in the dismissal of an action, such objections should be sustained only in the clearest of cases." *King v. Detroit [Tool] Coal Co.*, 452 Pa.Super. 334, [336-338],

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[5] In their statement of questions on cross-appeal, Appellees also include the following issues:

Did the trial court properly grant Defendants' motion to dismiss Plaintiff's claim for declaratory and injunctive relief as to a declaration of his domicile for tax years beyond 1987?

Did the trial court properly hold that Defendants were entitled to qualified immunity, and thus, not liable for damages?

We, however, find these two issues mere restatements of the issues raised by Appellant. Accordingly, we find only one true issue to be reviewed with regard to Appellees' cross-appeal.

682 A.2d 313, 314 (1996) (citation omitted). Moreover, because the burden rests upon the party challenging the court's exercise of jurisdiction, the court must consider the evidence in the light most favorable to the non-moving party. *Id.* See also *Filipovich v. J.T. Imports, Inc.*, 431 Pa.Super. 552, [555- 557], 637 A.2d 314, 316 (1994). Once the movant has supported its jurisdictional objection, however, the burden shifts to the party asserting jurisdiction to prove that there is statutory and constitutional support for the court's exercise of in personam jurisdiction. *See, e.g., McCall v. Formu-3 International, Inc.*, 437 Pa.Super. 575, [577-579] 650 A.2d 903, 904 (1994); *Derman v. Wilair Services, Inc.*, 404 Pa.Super. 136, [139-141], 590 A.2d 317, 319 (1991). *Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.*, 698 A.2d 80, 82 (Pa.Super.1997).

¶12 The seminal United States Supreme Court case regarding personal jurisdiction of non-resident defendants is *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In that case the Supreme Court stated that a state court may only exercise jurisdiction over a non-resident defendant so long as there exists "minimum contacts" between the defendant and the forum state. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Court redefined this principle, concluding that the minimum contacts requirement performs two distinct functions: (1) protecting the defendants against the burdens of litigating in a distant or inconvenient form; and (2) ensuring that states do not overreach beyond the limitations imposed on them by their status as "coequal sovereigns in a federal system." *Id.* at 292, 100 S.Ct. 559.

¶13 A defendant's contacts with the forum state (in this case, Pennsylvania) must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, quoting *International Shoe, supra* at 316, 66 S.Ct. 154. "Reasonableness, in turn, requires a consideration and balancing of the interests of the plaintiff, the defendant, and the forum state, and the interstate judicial system. The second purpose is served by a clear recognition of the nature of the federal system of government and the limits that system places on the power of the individual states." *Kachur v. Yugo America, Inc.*, 534 Pa. 316, 320, 632 A.2d 1297, 1299 (1993).

¶14 The transcript of the hearing wherein testimony was presented on the jurisdictional issue reveals that Grimes admits that the basis of his complaint is premised upon the propriety of the New York tax auditing process. Specifically, he claims that the state employees' failure to abide by guidelines caused him to be harassed by the State of New York in its efforts to assess taxes against him. Above and beyond these claims, Grimes admits that all of the defendants'/Appellees' conduct about which he complains occurred outside Pennsylvania, save for one letter sent by the defendants to this Commonwealth. See *Rose v. Granite City Police Dept.*, 813 F.Supp. 319 (E.D.Pa.1993) (the fact that one letter was mailed from a foreign city and its police department to this Commonwealth is not sufficient to confer Pennsylvania with jurisdiction over the matter under this Commonwealth's long-arm statute). Moreover, it is readily admitted that none of the Appellees reside in Pennsylvania, have a place of business or a registered office in Pennsylvania, and they do not do business in this Commonwealth.

¶15 In order to subject a defendant to in personam jurisdiction, there must be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking its benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Moreover, the "substantial connection" . . . between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposely directed toward the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

¶16 The trial court explained its finding of in personam jurisdiction over the Appellees, stating:

> It is clear that these defendants reached out and purposefully directed their activities toward a resident of this Commonwealth and, by their efforts to extract New York State taxes from plaintiff, caused harm felt by plaintiff in Pennsylvania. Given their intentional and allegedly tortious conduct, calculated to cause injury in Pennsylvania, it does not offend traditional notions of fair play and substantial justice to conclude that defendants could reasonably anticipate being haled into court in Pennsylvania.

¶17 In essence, Grimes' assertion of personal jurisdiction over the defendants is specifically related to their alleged actions–harassment and injury to Grimes by assessing him taxes in New York. In order for a Pennsylvania court to assert specific jurisdiction, the plaintiff's cause of action must arise out of the defendants' activities in the Commonwealth. *Garzone v.*

Kelly, 406 Pa.Super. 176, 593 A.2d 1292 (1991); *Derman v. Wilair Services, Inc.*, 404 Pa.Super. 136, 590 A.2d 317 (1991). The statutory bases of jurisdiction over non-residents of Pennsylvania is contained within 42 Pa.C.S. § 5322. The general rule, in part, provides that "the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." *Kachur*, *supra* at 319, 632 A.2d at 1298, citing 42 Pa.C.S. § 5322(b). The question as to whether a non-resident defendant has purposely directed his activities at residents of the forum is not whether it was foreseeable that the defendant's activities would be injurious in the forum, but whether the defendant's contacts with the forum state were such that he could reasonably anticipate being "haled" into court there. *Commonwealth Capital Funding, Inc. v. Franklin Square Hospital*, 423 Pa.Super. 149, 620 A.2d 1154 (1993).

¶18 Presently, the actions of the defendants in assessing overdue taxes on Grimes' status as a resident of New York were in no way directed towards this Commonwealth. Grimes was first notified of the tax issues while he was in New York. All correspondence was directed to his New York address and all inquiries were made to his New York financial representative. Moreover, the tax laws and guidelines at issue were promulgated by the legislature in that state and are most appropriately interpreted by that state's courts–to have this court make such legal determinations would exceed this Commonwealth's sovereign limitations. *World-Wide Volkswagen, supra.*

¶19 Once the Appellees supported their jurisdictional objection, the burden shifted to Grimes to prove that there is statutory and constitutional support for the trial court's exercise of jurisdiction over Appellees. *Hall-Woolford Tank Co., supra.* After a review of the facts, evidence and testimony in the record we cannot find that Appellees' contacts with Pennsylvania support the exercise of specific personal jurisdiction in this case. *Id.*

¶20 The trial court's statement that the Appellees caused Grimes to feel harm in Pennsylvania is specious at best. In his complaint Grimes asserts the following "injuries" that resulted from Appellees' conduct:

> 1. Grimes had been deprived of the right to freely and without hindrance establish and maintain his domicile in Pennsylvania.
>
> 2. Grimes has been deprived of the right to travel freely and without hindrance between Pennsylvania and New York.
>
> 3. Grimes has been subjected to great mental and psychological stress and uncertainty.
>
> 4. Appellees' actions have cast a cloud upon Grimes' entitlement to exercise the privileges of citizens and residents of Pennsylvania.
>
> 5. Grimes is unable to establish the amount of taxes he will have to pay in Pennsylvania because Pennsylvania issues a tax credit for persons who pay taxes to New York.
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> 6. Grimes is uncertain as to whether he must arrange for expensive hotel accommodations while staying in New York to avoid being taxed as a resident.

7. Grimes is uncertain whether he can travel to New York more than 30 days out of the year without being taxed as a New York resident.

8. Grimes cannot make estate planning decisions with confidence because he may be determined a New York domiciliary at his decease and New York estate taxes would be levied on his estate.

9. Harm is threatened to Pennsylvania in that it will be deprived of revenues if plaintiff is forced to pay taxes to New York.

¶21 These so-called "injuries" are not of the type of harm that our long-arm statute anticipates to give rise to personal jurisdiction. Rather these effects are merely a result of an out-of-state authority taxing a person who lives in this Commonwealth; if we were to interpret such "injuries" as falling within the ambit of section 5322(a)(4), we would in essence be opening up the judicial floodgates by creating personal jurisdiction in cases where a foreign entity attempts to collect taxes owed by another state's residents–a highly common scenario.

¶22 Additionally, even if Appellees were properly served under this Commonwealth's long-arm statute, we cannot find that the required constitutional "minimum contacts" exist in this case to confer personal jurisdiction over Appellees. Although some of the Appellees, as employees of a New York taxing authority, may have traveled to this Commonwealth to investigate Grimes' whereabouts (without success, nonetheless), this does not automatically translate into activities where they "availed themselves of the privilege of conducting activities within [Pennsylvania]. . ., thus invoking the 'benefit and protection' of [Pennsylvania]." *Burger King*

v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Such contact is by far attenuated and should not form the basis of establishing the required "minimum contacts" for personal jurisdiction in this case. Appellees did not target this Commonwealth through their conduct. *See Santana Prod., Inc. v. Bobrick Washroom Equipment*, 14 F.Supp.2d 710 (M.D.Pa.1998). Finally, Appellees could not reasonably anticipate being haled into court in Pennsylvania. *Commonwealth Capital Funding, supra.*

¶23 Order reversed. Case dismissed. Jurisdiction relinquished.

Judgment Entered.

/s/

Prothonotary

Date: Mar 23, 2000

APPENDIX B

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 93-10226
CIVIL ACTION – EQUITY

CHARLES L. GRIMES

vs.

JAMES W. WETZLER, Individually and as Tax Commissioner of the State of New York, PHILIP ZURLO, WARREN BROWN, MARY ANN LINN and SUNEIL MEHRA, Individually and as employees of the Department of Taxation and Finance of the State of New York, and NEW YORK, a municipal corporation

William H. Lamb, Esquire and James C. Sargent, Jr., Esquire, on behalf of the Plaintiff

Cathy A. Wilson, Esquire and Marcie S. Mintz, Esquire, on behalf of the Defendants

ORDER

AND NOW, this 27th day of December, 1994, upon consideration of the Preliminary Objections of Defendants to Plaintiff's Complaint, Plaintiff's response and the oral arguments presented, it is hereby ORDERED and DECREED that said Preliminary Objections are OVERRULED. It is further ORDERED that Defendants shall file an Answer to Plaintiff's Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

/s/ Howard F. Riley, Jr.
J.

APPENDIX C

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 93-10226
CIVIL ACTION – EQUITY

CHARLES L. GRIMES

vs.

JAMES W. WETZLER, Individually,
MICHAEL H. URBACH, as Tax Commissioner
of the State of New York,
PHILIP ZURLO, WARREN BROWN, MARY ANN LINN
and SUNEIL MEHRA, Individually, and as
employees of the Dept. of Taxation and Finance
of the State of New York

William H. Lamb, Esquire and
James C. Sargent, Jr., Esquire,
on behalf of the Plaintiff

Cathy A. Wilson, Esquire and
Frederic L. Lieberman, Esquire,
on behalf of the Defendants

ORDER

AND NOW, this 11th day of June, 1996, upon consideration of Plaintiff's Motion for Sanctions and Defendants' Response thereto, it is hereby ORDERED and DECREED that said Motion is DENIED, and it is further ORDERED as follows:

1. Defendants' Motion for Reconsideration or Amendment of this Court's Order of December 17, 1994 is DENIED;[1]

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[1] *Background*

Plaintiff, Charles L. Grimes, brought this action against the Tax Commissioner of New York and several employees of the Department of Taxation and Finance of the State of New York under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Plaintiff seeks a declaratory judgment that he is, and since 1978 has been, domiciled in Pennsylvania and that defendants' alleged harassment of him on the grounds that he is domiciled in New York violates his constitutional rights.

The defendants are James W. Wetzler, individually, Michael H. Urbach, as Tax Commissioner of the State of New York, and Philip Zurlo, Warren Brown, Mary Ann Linn and Suneil Mehra, individually and as employees of the Department of Taxation and Finance of the State of New York. Plaintiff alleges that the individual defendants have "combined together and conspired" to engage in threatening practices designed to harass and badger plaintiff into paying taxes to New York on the basis of his alleged domiciliary in that state.

According to the Complaint, defendants have denied the *bona fides* of plaintiff's change of domicile to the Commonwealth of Pennsylvania, and have harassed and threatened him in the following ways:

(1) Beginning with a telephone call from defendant Mehra to Paul Czarnowski, plaintiff's accountant, Mehra sought a meeting and Czarnowski with respect to plaintiff's taxable year 1987.

(2) Czarnowski was unable to meet with defendant Mehra at that time, to which Mehra expressed indignation and sent to Czarnowski "an elaborate, burdensome and one-sided questionnaire . . . designed to demonstrate that plaintiff was a New York domiciliary."

(3) Defendant Mehra had several telephone conversations with Czarnowski, insisting that they meet in a location remote from and inconvenient to Czarnowski's office.

(4) Czarnowski repeatedly requested that they meet in Czarnowski's office, due to the voluminous documentation involved and the fact that Czarnowski was on crutches.

(5) Czarnowski ultimately agreed to meet with defendant Mehra in defendant's chosen location and together they

reviewed all relevant documentation supporting plaintiff's non-resident status.

(6) Notwithstanding the fact that Mehra undertook to arrange a further meeting to review the documentation in greater detail, plaintiff received a notice assessing taxes for 1987 as a resident of New York, without further communication from Mehra.

(7) After protestation by Czarnowski to Mehra's superior, defendant Zurlo, Zurlo asked if further review of the documents could be conducted, to which Czarnowski agreed.

(8) The assessment was accordingly withdrawn and, thereafter, defendant Mehra and her supervisor, defendant Linn, further examined the documentation.

(9) Thereafter, defendants Mehra and Linn told Czarnowski that plaintiff had been determined to be taxable as a resident for 1987, on the basis that he had been present in the state for more than 183 days in that year while maintaining a "permanent place of abode" therein.

(10) At Czarnowski's request, defendants Mehra and Linn sent their worksheets, upon examination of which plaintiff determined that defendants had misinterpreted plaintiff's records.

(11) Another meeting followed, in which plaintiff and Czarnowski met with defendants Brown (supervisor of defendant Linn), Linn and Mehra in Queens and pointed out defendants' alleged errors.

(12) Defendants Linn and Mehra reviewed the documents once again and subsequently concluded that plaintiff was domiciled in New York and was taxable for 1987 as a resident of New York on different grounds than had been previously determined, as a result of which a formal notice of deficiency was served upon plaintiff.

Defendants filed preliminary objections, moving to dismiss the complaint on the basis that this Court lacked personal jurisdiction over them and alternatively that plaintiff had failed to exhaust his administrative remedies.

By Order dated December 27, 1994, the Court denied defendants' preliminary objections and defendants timely moved for reconsideration of that Order. On April 12, 1995, the Court granted defendants' request and, at the same time, entered an order staying all depositions pending determination of defendants' motion for reconsideration.

In June of 1995, a hearing was held before the New York State Division of Tax Appeals . Based upon the evidence adduced at the hearing, the Division of Taxation agreed to cancel the assessment issued against plaintiff for taxes for the year 1987.

Subsequently, plaintiff filed a Motion for Sanctions seeking, *inter alia*, denial of defendants' Motion for Reconsideration and sanctions by way of recovery of counsel fees allegedly incurred by plaintiff in connection with litigation on the issue of jurisdiction.

Defendants contend and have maintained since the inception of this lawsuit that this Court does not have personal jurisdiction over them because they do not conduct business, reside or maintain a registered office in Pennsylvania.

Plaintiff alleges that the Court has long-arm jurisdiction based on 42 Pa. Cons. Stat. Ann. §§5322 (a) (4) and 5322 (b) which confer jurisdiction over persons who cause "harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth."

Subsequent to filing his Complaint, plaintiff learned through discovery that the Department of Taxation and Finance of the State of New York "maintains a network of collectors to collect New York taxes and hold and remit the funds so collected as trustees for, and on account of, the State of New York." Additionally, plaintiff discovered that "defendants Linn and Mehra, with the specific authorization, approval and ratification of their superior, defendant Brown, have traveled to Pennsylvania in May of 1992 and taken action within the Commonwealth in furtherance of the matters of which plaintiff complains." On the basis of these activities, plaintiff contends that personal jurisdiction is properly exercised on the basis of both specific and general jurisdiction.

In their answer to plaintiff's Motion for Sanctions, defendants deny that such conduct constitutes a basis for asserting jurisdiction and avers that the system of tax collection to which plaintiff alludes is a "statutory and regulatory scheme related to the collection of New York Sales and Use tax, pursuant to which the Department of Taxation and Finance is "the recipient of New York Use taxes collected by various persons or entities as trustees for and on account of the State of New York, based upon the use of the products that are shipped into the State of New York."

With respect to defendants' trip to Pennsylvania, defendants admit that Mehra and Linn traveled to Pennsylvania in search of the address of the home of plaintiff, in an attempt to investigate his claim

that he was domiciled in Pennsylvania. Notwithstanding these activities, defendants maintain that such conduct does not provide a sufficient basis for asserting personal jurisdiction over defendants.

Standard of Review

In ruling on preliminary objections, the Court must consider the evidence in the light most favorable to the non-moving party. *Richard T. Byrnes Co. v. Buss Automation, Inc.*, 609 A. 2d 1360 (Pa. Super. 1992). A court must generally accept as true all well and clearly pleaded facts, together with such reasonable inferences that may be drawn therefrom. *Santiago v. Pennsylvania Nat. Mut.*, 613 A. 2d 1235 (Pa. Super. 1992). Preliminary objections should only be granted in cases that are clear and free from doubt. *Zinc Corp. of America v. Dept. of Environmental Resources*, 145 Pa. Cmwlth. 36, 603 A. 2d 288 (1992), *aff'd.* 533 Pa. 319, 623 A. 2d 321 (1993). This rule is particularly applicable when the preliminary objections, if granted would result in the dismissal of the action. *Derman v. Wilair Services, Inc.*, 404 Pa. Super. 136, 590 A. 2d 317 (1991), *application for allowance of appeal den'd*, 529 Pa. 621, 600 A. 2d 537 (1991). Moreover, the mere allegation in a preliminary objection that the court lacks in personam jurisdiction over the defendant does not place the burden of negating such allegations upon the plaintiff. *Gail v. Hammer*, 420 Pa. Super. 512, 617 A. 2d 23 (1992). Rather, it is the defendant who challenges the court's exercise of jurisdiction who bears the burden of supporting such objections by presenting evidence. *Id.* Only after the defendant has done so does the burden shift to the plaintiff to adduce sufficient competent evidence to establish the court's jurisdiction. *Accu-Weather v. Thomas Broadcasting Co.*, 425 Pa. Super. 335, 625 A. 2d 75 (1993).

Discussion

The assertion of personal jurisdiction over the defendants in New York requires a two-pronged analysis. The court must determine whether the Pennsylvania long-arm statute, 42 Pa. C.S. §5322, authorizes the assertion of jurisdiction under these circumstances and, if so, whether the application of the statute comports with the Due Process Clause of the Fourteenth Amendment.

Section 5322 (a) (4) provides as follows:

> (a) General rule. –A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who

> would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person;
>
> . . . .
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

42 Pa. C.S. §5322 (a) (4).

The plain and clear meaning of this provision is that Section 5322 (a) (4) confers *in personam* jurisdiction over an individual who, acting directly or through an agent, causes harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

Here, plaintiff alleges that defendants, acting under color of state law, violated his constitutional rights by denying the *bona fides* of his Pennsylvania domiciliary and engaging in acts of harassment on the allegedly specious ground that he is domiciled in New York. Such acts, as alleged, have deprived plaintiff, *inter alia*, of his right to establish and maintain his domicile in this Commonwealth, to travel freely between this Commonwealth and the State of New York, to determine with confidence what amount of taxes to pay to the Commonwealth, to make estate planning decisions with certainty and to freely exercise his entitlement to the privileges of citizenship and residency in this Commonwealth.

These allegations meet the test for asserting personal jurisdiction under the Pennsylvania long-arm statute, defendants' conduct having caused harm in this Commonwealth by actions taken outside this Commonwealth, i.e., New York.

Having concluded that the statutory prerequisites are satisfied, the Court must then determine whether the assertion of personal jurisdiction is consistent with due process of law. Under the principles articulated by the United States Supreme Court in *International Shoe Co. v. Washington*, due process requires that the defendant have "certain minimum contacts" with the forum state such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945).

Providing further clarification in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, (1985), the Court held that the determination of whether sufficient minimum contacts exists is based on a finding that the "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 472.

Critical to this analysis is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the "benefit and protection" of that state's laws. Contacts with the forum that are "random", "fortuitous" or "attenuated" do not suffice. *Id.* at 475. *Burger King* additionally states that

> Where individuals 'purposefully derive benefit' from their interstate activities, [citation omitted] it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

Id. at 473-474.

Moreover, the law is well-settled that certain intentional conduct in one forum which has an effect in a second forum can be a sufficient and valid basis for finding minimum contacts in the second forum. *Calder v. Jones*, 465 U.S. 783 (1984).

Applying these principles to the case at bar, the Court finds that the allegations of the complaint are sufficient to establish that this Court has in personam jurisdiction over the defendants in this matter. It is clear that these defendants reached out and purposefully directed their activities toward a resident of this Commonwealth and, by their efforts to extract New York State taxes from plaintiff, caused harm felt by plaintiff in Pennsylvania. Given their intentional and allegedly tortious conduct, calculated to cause injury in Pennsylvania, it does not offend traditional notions of fair play and substantial justice to conclude that defendants could reasonably anticipate being haled into court in Pennsylvania.

The Court concludes, therefore, that the defendants have the requisite minimum contacts with Pennsylvania such that the assertion of personal jurisdiction over them is constitutional.

Defendants also argue that personal jurisdiction does not exist because any contacts that defendants may have had with the Commonwealth were undertaken in their official capacities as employees of the New York Department of Taxation and Finance.

The Court is mindful of the general rule that a court may not exercise jurisdiction over individual officers and directors of a corporation for acts taken in their corporate capacities. *See Simpkins Corporation v. Gourmet Resources International*, 601 F. Supp. 1336 (E.D. Pa. 1985); *Simpson v. Lifespring, Inc.*, 572 F. Supp. 1251 (E.D. Pa. 1983); aff'd without opinion, 770 F. 2d 1975 (3d. Cir. 1985); *PSG Professional Services Group, Inc. v. American Digital Systems, Inc.*, 55 F. Supp. 788 (E.D. Pa. 1983).

However, the Court asserts jurisdiction over these defendants in reliance upon the well-recognized exception that jurisdiction may be exercised over a corporate officer who has been personally and/or directly involved in a corporation's tortious conduct, albeit in his/her corporate capacity. *See Maleski By Taylor v. DP Realty Trust*, 653 A. 2d 54, 62 (Cmwlth. Ct. 1994) (citations omitted).

Application of this exception requires the Court to exercise such factors as the officer's position in the corporate structure, the nature of the officer's contacts with the forum and the extent of the officer's participation in the alleged tortious conduct. *Id.* at 63.

The complaint alleges that defendant Wetzler is Tax Commissioner of the State of New York and that defendants Zurlo, Brown, Linn and Mehra are employees of the Department of Taxation and Finance of the State of New York, and "are responsible to, are agents of, and carry out the policies and instructions of, defendant Wetzler." The complaint further alleges that defendants Zurlo, Brown, Linn and Mehra actively participated in the alleged acts of harassment, as previously described, and did so pursuant to clearly defined guidelines specifically issued by defendant Wetzler effective February 17, 1993.

With respect to defendant Michael H. Urbach, he was joined as a defendant in this action in his official capacity when he replaced James W. Wetzler as Tax Commissioner of New York. Plaintiff avers that employees acting under his direction, supervision and control continued to engage in acts of harassment directed at plaintiff, a Pennsylvania resident, and continued to demand and attempt to extract New York State taxes from plaintiff, in violation of his constitutional right to change his domicile and freely engage in interstate travel.

2. Plaintiff's Motion to Strike Paragraphs 51 and 53 of Defendants' Answer if DENIED; and

3. Plaintiff's Motion for an Order Deeming Admitted Plaintiff's Requests for Admissions and for Sanctions is DENIED.

4. Plaintiff's Motion for Reimbursement of Attorneys Fees and Costs is DENIED.

BY THE COURT:

/s/ Howard F. Riley, Jr.
J.

The Court finds the personal involvement of these defendants sufficient to exercise personal jurisdiction over them, consistent with due process protections of fair play and substantial justice.

APPENDIX D

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 93-10226
CIVIL ACTION – EQUITY

CHARLES L. GRIMES

vs.

JAMES W. WETZLER, Individually,
MICHAEL H. URBACH, as Tax Commissioner
of the State of New York,
PHILIP ZURLO, WARREN BROWN, MARY ANN LINN
and SUNEIL MEHRA, Individually and as
employees of the Department of Taxation and Finance
of the State of New York

William H. Lamb, Esquire and
James C. Sargent, Jr., Esquire,
on behalf of the plaintiff

Cathy A. Wilson, Esquire and
Frederic L. Lieberman, Esquire,
on behalf of the defendants

ORDER

AND NOW, this 13th day of November, 1997, upon consideration of Defendants' Motion to Dismiss and Plaintiff's Answer thereto, it is hereby ORDERED and DECREED that said motion is GRANTED in part and DENIED in part as follows:

1. Defendants' Motion is GRANTED to the extent that plaintiff seeks a declaration concerning his domicile for any year other than 1987[1]; and

2. Defendants' Motion is DENIED with respect to plaintiff's request for relief pursuant to the Civil Rights Act of 1871, 42 U.S.C. Section 1983[2].

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[1] The law of this Commonwealth is clear that declaratory judgment relief is only available when an actual controversy exists. The Pennsylvania Supreme Court held in *Gulnac v. South Butler School District*, 587 A. 2d 699, 701 (Pa. 1991), "[o]nly where there is a real controversy, may a party obtain a declaratory judgment . . . . A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a median for the rendition of an advisory opinion which may prove to be purely academic."

Although plaintiff seeks a declaration concerning his domicile as of 1978, the only year in issue is 1987. Plaintiff's Complaint alleges that he believes that the defendants will attempt to collect taxes from him in years subsequent to 1987; however, there are no specific facts alleged to establish conduct for the collection of taxes for any year other than 1987. At the conclusion of the New York State administrative appeal process, the New York Division of Taxation made a determination that Mr. Grimes was not a domiciliary of New York as of 1987. A letter of determination to that effect was issued and the deficiency of taxes for the year of 1987 was cancelled. Because the issue of Mr. Grimes' domicile in 1987 has been resolved, there is no actual controversy between the parties that requires the intervention of this court.

[2] In *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S.Ct. 2351 (1995), the United States Supreme Court held that " §1983 does not provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." Defendants contend that an adequate state remedy is available in the form of administrative procedures provided by New York state law which Mr. Grimes has in fact used to challenge the determination of his 1987 domicile.

Although the court would agree that these procedures provide an adequate legal remedy with respect to the issue of Mr. Grimes'

It is further ORDERED and DECREED that Plaintiff's Motion for Partial Judgment on the Pleadings is DENIED.[3]

BY THE COURT:

/s/ Howard F. Riley, Jr.
J.

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domicile, they provide no redress for the alleged violations of his constitutional rights. Plaintiffs claims that defendants' attempt to enforce the New York tax against him has infringed upon the exercise of his constitutional right to establish his domicile and travel freely between the states. The administrative procedures to which defendants refer do not redress these alleged injuries, nor have defendants cited any other legal remedies available under state law.

For the foregoing reasons, therefore, that portion of Plaintiff's Complaint which seeks relief for the alleged deprivation of his constitutional rights shall not be dismissed.

[3] Judgment on the pleadings is appropriate under Pennsylvania Rule of Civil Procedure 1034 only when no facts are in dispute. Further, when deciding such a motion, only those facts which are specifically admitted can be used against a party. *Sejpel v. Corson, McKinley, M.D's Inc.*, 445 Pa. Super. 427, 665 A. 2d 1198 (1995); *Kelley v. Nationwide Ins. Co.*, 414 Pa. Super. 6, 606 A. 2d 470 (1992); *Felli v. Com., Dept. of Transp.*, 666 A. 2d 775 (Pa. Cmwlth. 1995).

The only issue now before this court is whether defendants' conduct in attempting to collect taxes from plaintiff for the year 1987 violated plaintiff's constitutional rights, an issue about which there are clearly factual disputes. Plaintiff's motion is therefore denied.

APPENDIX E

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 93-10226
CIVIL ACTION – EQUITY

CHARLES L. GRIMES

vs.

JAMES W. WETZLER, Individually,
MICHAEL H. URBACH, as Tax Commissioner
of the State of New York,
PHILIP ZURLO, WARREN BROWN, MARY ANN LINN
and SUNEIL MEHRA, Individually and as
employees of the Department of Taxation and Finance
of the State of New York

William H. Lamb, Esquire and
James C. Sargent, Jr., Esquire,
on behalf of the plaintiff

Cathy A. Wilson, Esquire and
Frederic L. Lieberman, Esquire,
on behalf of the defendants

ADJUDICATION

*****

CONCLUSIONS OF LAW

1. The Civil Rights Act of 1871, 42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. This Court has the authority and duty to entertain actions under 42 U.S.C. Section 1983.[1] *E.g., Law v. Fisher*, 41 Pa. Cmwlth. 389, 399 A.2d 453 (1979); *Howlett v. Rose*, 496 U.S. 356 (1990); Pa. Const. Art. I, Section 26.

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[1] On November 13, 1997, this court issued an order denying defendants' motion to dismiss on the grounds that the New York state administrative procedures "provide no redress for the alleged violations of his [Grimes] constitutional rights." In November of 1998, relying upon the recent decision of *Murtagh et al. v. County of Berks*, 715 A. 2d 548 (Pa. Cmwlth. 1998), defendants requested that the court take another look at this pivotal issue. The court did so, and has again concluded that, while defendants' arguments are very compelling, the New York administrative process does not afford Mr. Grimes an opportunity for "plain, adequate and complete relief" with respect to his constitutional claims. In *Sunderland Properties, Inc. v. County of Berks*, 750 F. Supp. 704 (E.D. Pa. 1990), the federal district court stated: "A plaintiff's state remedy is plain, speedy and efficient if it provides the taxpayer with a full hearing and judicial determination at which the taxpayer may raise federal constitutional objections." *Id.* at 707, citing *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1982). The district court found the remedy to be plain, adequate and complete because pursuant to the General County Assessment Law, specifically 42 P.S. Sections 5020-518.1, the court of common pleas had broad powers to grant appropriate relief, which would include the consideration of constitutional issues. *Id.* at 708-710. Defendants have not demonstrated that the New York administrative process provides anything more than a review of the actions of the New York State Department of Taxation. Therefore, while this review process may be the "exclusive remedy for review of a liability for personal income tax", as defendants state in their Supplemental Memorandum, there is no indication that it provides a forum for Mr. Grimes to adjudicate his federal constitutional objections.

3. This Court has jurisdiction of this case under 42 Pa.C.S.A. Sections 5322 (a) (4) and 5322 (b). *Calder v. Jones*, 465 U.S. 783 (1984), and *Leonardo da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222 (E.D. Pa. 1991).

*****

DECREE NISI

AND NOW, this 20th day of January, 1999, it is hereby ORDERED and DECREED that plaintiff's claims against the defendants are DENIED and DISMISSED.

This Decree Nisi shall become Final Decree unless post-trial motions are filed in accordance with Pa.R.C.P. 227.1 within ten days of its docketing.

BY THE COURT:

/s/ Howard F. Riley, Jr.
J.

APPENDIX F

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 93-10226
CIVIL ACTION – EQUITY

CHARLES L. GRIMES

vs.

JAMES W. WETZLER, Individually,
MICHAEL H. URBACH, as Tax Commissioner
of the State of New York,
PHILIP ZURLO, WARREN BROWN, MARY ANN LINN
and SUNEIL MEHRA, Individually, and as
employees of the Dept. of Taxation and Finance
of the State of New York

ORDER

AND NOW, this 19th day of July, 1999, upon consideration of Plaintiff's and Defendants' Post-Trial Motions, it is hereby ORDERED AND DECREED that such motions are DENIED.

By the Court:

/s/ Howard F. Riley, Jr.
J.

APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

Nos. 298 & 299 MAL 2000

CHARLES L. GRIMES,

Petitioner,

v.

JAMES W. WETZLER, INDIVIDUALLY, AND MICHAEL H. URBACH, AS TAX COMMISSIONER OF THE STATE OF NEW YORK, PHILIP ZURLO, WARREN BROWN, MARY ANN LINN, AND SUNEIL MEHRA, INDIVIDUALLY AND AS EMPLOYEES OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

Petitions for Allowance of Appeal
from Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 6th day of February, 2001, the Petitions for Allowance of Appeal are hereby DENIED.

TRUE & CORRECT COPY

ATTEST: FEB 7 2001

/s/ Shirley J. Phipps
SHIRLEY J. PHIPPS
APPELLATE CLERK

APPENDIX H

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION — EQUITY
DECLARATORY JUDGMENT
NO. _____

CHARLES L. GRIMES,

Plaintiff,

vs.

JAMES W. WETZLER, individually and as Tax Commissioner of the State of New York; and PHILIP ZURLO, WARREN BROWN, MARY ANN LINN and SUNEIL MEHRA, individually and as employees of the Department of Taxation and Finance of the State of New York,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGES OF THIS COURT, IN EQUITY SITTING:

CHARLES L. GRIMES, plaintiff herein, brings by his undersigned attorneys this his complaint against the defendants above named, and thereupon complains and says:

I.

Plaintiff is a resident of the County of Chester, Commonwealth of Pennsylvania.

II.

Defendants are residents of the State of New York, having their principal places of business in the City of Albany, New York, in the case of defendant Wetzler, and in the City of New York, in the case of the other defendants.

III.

This is an action for declaratory judgment pursuant to 42 Pa. Cons. Stat. Ann. § 7531 *et seq.*, for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears.

IV.

Jurisdiction of this action is based on 42 Pa. Cons. Stat. Ann. § 7531.

V.

This action is to secure a declaration of the rights and relations of the parties so as to terminate the actual substantial justiciable controversy between them set forth hereinbelow, to-wit:

VI. The Parties and the Nature of This Suit

A. *The Plaintiff*

1. Plaintiff is, and all his life has been, a citizen, domiciliary, and resident of the United States, and is, and at all times after 1978 has been, a citizen, domiciliary, and resident of the Commonwealth of Pennsylvania and of this county, presently residing on Route No. 926, West Marlborough Township (R.D. 2, West Grove).

2. Born in the District of Columbia and originally resident and domiciled therein, plaintiff was a domiciliary of the State of New York at the beginning of

1978 and for some time prior thereto. During that year he changed his domicil to Pennsylvania, pursuant to the right to do so freely and without hindrance which is secured to him by the constitution of the United States; all as is more fully set forth hereinbelow.

B. *General Summary of the Wrongs Complained Of and Their Effect in Pennsylvania*

3. Plaintiff brings this suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for relief against acts and threatened acts by defendants, acting under color of the law and custom of the State of New York, which have subjected, are now subjecting, and threaten in the future to subject, plaintiff to the deprivation of rights, privileges, and immunities secured to plaintiff by the constitution and laws of the United States, to-wit: the right and privilege of a citizen of the United States freely and without hindrance to change his domicil from the State of New York to the Commonwealth of Pennsylvania and maintain it there; the right and privilege of a citizen of the United States to travel freely and without hindrance between States of the United States; and the immunity of a citizen of the United States from interference with, and harassment because of, his exercise of such rights and privileges; all as is more fully set forth hereinbelow.

4. This honorable Court has personal jurisdiction over all defendants with respect to the matters herein complained of, and all defendants may be served in this county, under 42 Pa. Cons. Stat. Ann. §§ 5322(a)(4) and 5322(b), in that the acts and threatened acts set forth herein were and are expressly aimed and purposefully directed at (a) plaintiff, a resident of this Commonwealth and this county, (b) at this Commonwealth, and (c) at plaintiff's change of domicil

to this Commonwealth and this county, all for the pecuniary benefit of the State of New York and the professional and personal advancement of the defendants; and by such acts, defendants have caused, are causing, and unless restrained by this honorable Court will continue to cause, harm and tortious injury in this Commonwealth and this county in at least the following respects, without limitation:

(a) Plaintiff has been deprived, is being deprived, and if defendants persist in their conduct will continue to be deprived, of the right freely and without hindrance to establish and maintain his domicil in this Commonwealth and this county.

(b) Plaintiff has been deprived, is being deprived, and if defendants persist in their conduct will continue to be deprived, of the right to travel freely and without hindrance between this Commonwealth and this county, on the one hand, and the State of New York, on the other hand.

(c) Plaintiff has been subjected, within this Commonwealth, to great mental and psychological stress and uncertainty.

(d) The acts and threatened acts herein complained of cast a cloud upon plaintiff's entitlement to exercise within this Commonwealth and this county the privileges of citizens and residents thereof.

(e) Defendants are likely to seek to collect from plaintiff within this Commonwealth and this county, under 42 Pa. Cons. Stat. Ann. § 7551, taxes and other exactions assessed on the basis of

plaintiff's alleged domicil in New York pursuant to the acts and threatened acts herein complained of.

(f) Pursuant to the policies and guidelines hereinbelow described, one or more of the defendants, personally or through an agent or person acting in combination with him, is likely to demand to inspect plaintiff's home and "treasured possessions" within this Commonwealth and this county.

(g) Since the Commonwealth of Pennsylvania grants a credit under certain circumstances for taxes paid to the State of New York and to New York City, plaintiff is unable to determine with confidence what amount of estimated taxes to pay to the Commonwealth for the current year.

(h) Plaintiff is uncertain whether he can travel from his home in this Commonwealth and this county to New York on more than 30 days out of the year without having taxes on a resident basis asserted against him.

(i) Plaintiff is uncertain whether, as part of his travel from this Commonwealth and this county to New York, he must arrange for expensive hotel accommodations, or can maintain a pied-a-terre in New York for his convenience without having taxes on a resident basis asserted against him even though he spends little time there.

(j) Plaintiff cannot make estate planning decisions with confidence, since if plaintiff were determined to be a New York domiciliary at his

decease, New York estate taxes would be levied on his estate, and New York would levy a gift tax on *inter vivos* gifts made by plaintiff as a domiciliary of New York.

(k) Harm is also threatened to the Commonwealth of Pennsylvania itself, in that it will be deprived of revenues if plaintiff is forced to pay taxes to the State of New York as a domiciliary thereof.

C. *The Defendants*

5. Defendant Wetzler is Tax Commissioner of the State of New York, and is clothed by the constitution and laws of the said state with the power and duty to enforce the revenue laws thereof.

6. Defendants Zurlo, Brown, Lin, and Mehra are employees of the Department of Taxation and Finance of the State of New York, and are responsible to, are agents of, and carry out the policies and instructions of, defendant Wetzler. On information and belief, defendant Zurlo is a District Audit Manager, defendant Brown is a Section Supervisor, defendant Lin is a Group Supervisor, and defendant Mehra is an Auditor.

7. All the defendants have combined together and conspired to commit and threaten to commit the acts herein complained of.

VII. Acts and Threatened Acts of Defendants Herein Complained Of

A. *Defendants' Policies and Practices*

8. The State of New York imposes, and at all times material hereto has imposed, income taxes and other personal taxes on residents and certain other persons.

9. Persons deemed by the State of New York to be "residents" for taxing purposes are taxed on all their income, from sources both within and without the state.

10. The laws of the State of New York provide, and at all times material hereto have provided, that domiciliaries of the State of New York are taxed as "residents" for income tax purposes with respect to a taxable year, unless they both (a) maintain no "permanent place of abode" in the state during that year and (b) are not present in the state on more than 30 days in that year. A day is counted for these purposes if the domiciliary is present within the state for any portion, however short, of a 24-hour calendar day.

11. In addition, the State of New York imposes burdensome gift taxes on gifts made by domiciliaries of the state, and burdensome estate taxes on the estates of decedents who were domiciled in the state.

12. The laws of the State of New York provide, and at all times material hereto have provided, that persons who are *not* domiciliaries of the state of New York are also taxed as "residents" for income tax purposes for a taxable year if they maintain a "permanent place of abode" in the state during that year and are present in the state on more than 183 days in that year. A day is counted for these purposes if the person is present within the state for any portion, however short, of a 24-hour calendar day.

13. In order to impose such taxes upon as many persons as possible, it is, and for many years (including all times material to this action) has been, a conscious and deliberate custom and policy of the State of New York to harass United States citizens who are former New York State domiciliaries in order to extract taxes

from them as if they were still New York State domiciliaries, without regard for or deference to the laws and policies of other states or rights secured by the constitution and laws of the United States. Such harassment takes, without limitation, such forms as the following:

(a) Tax auditors and other officials challenge the *bona fides* of the citizen's change of domicil.

(b) Burdensome tax audits are imposed on such citizens, with accompanying threats to assess taxes and associated fines, interest, and penalties.

(c) In such proceedings, the burden of proof is placed on the citizen to prove that he has exercised his constitutional right to change domicil.

(d) In such proceedings, only evidence allegedly supporting a continued New York domicil is generally given weight, and evidence supporting the exercise of the constitutional right to change domicil is rejected or given little weight.

(e) Trivial matters are taken as affording significant support for the contention that the constitutional right to change domicil has not been exercised.

(f) Officials do not inquire into facts supporting the exercise of the constitutional right to change domicil, and inquire only into facts allegedly supporting a continued New York domicil.

(g) The citizen is required to satisfy the authorities that he has exercised his constitutional right to change domicil not by the normal preponderance of the evidence, but by "clear and convincing" evidence.

(h) In practice, the citizen is presumed to be lying.

(i) The citizen's only recourse is to an administrative agency which is aggressively disrespectful of the exercise of the constitutional right to change domicil and whose determinations receive judicial review only for substantial evidence.

14. Where such a citizen maintains, or arguably maintains, a "permanent place of abode" in the State of New York, New York tax auditors and officials commonly begin by seeking to establish taxability on a resident basis by claiming that the citizen was present in New York on more than 183 days out of the year, and proceed to a claim of New York domicil if they find that they are unable to support such a claim.

15. Such custom and policy has for many years been implemented by the taxing authorities of the State of New York and their employees, including defendants Wetzler, Zurlo, Brown, Lin, and Mehra.

B. *Defendants' Application of Such Policies and Practices to Plaintiff*

1. *Plaintiff's Domicil in Pennsylvania*

16. Prior to 1978 plaintiff was a domiciliary and resident of the State of New York.

17. In or about 1978, plaintiff concluded that New York was an increasingly unsafe place in which to live, and that he wished to make his home in a cleaner, safer, and more spacious and pleasant place, more conveniently situated to most of his major clients.

18. Moreover, plaintiff was primarily engaged in financial analysis and planning, and almost all the assets of most of his clients were physically located in Pennsylvania; moreover, substantially all such assets that were located in New York belonged to persons who were neither domiciliaries nor residents of New York.

19. Further, plaintiff was to be made executor of at least one very substantial Pennsylvania estate; and was so made and still so serves.

20. In addition, it was medically desirable for him to move to the country. In his younger years plaintiff was an active athlete, and among other athletic accomplishments was an Olympic gold medalist; however, with advancing years he found conventional exercise more and more difficult, and was advised to get his exercise by gardening and other outdoor work in the country, where the air quality is presumably superior.

21. Plaintiff accordingly moved to rural Chester County in the year 1979 with the intent to establish domicil there permanently, and with the fixed intention of forever abandoning any New York domicil.

22. Plaintiff has been domiciled in the Commonwealth of Pennsylvania and in Chester County continuously from that time to the present, intends to remain domiciled in Pennsylvania permanently, and has no intention or desire to be a domiciliary of New York.

23. Plaintiff has paid income and other taxes to the Commonwealth of Pennsylvania as a resident for every year from 1979 to the present.

24. Defendants have taken the position that such payment of Pennsylvania taxes constituted a voluntary gift to the Commonwealth of Pennsylvania.

25. Plaintiff's only "voluntary gift" of taxes has in fact been to the State of New York and to New York City, as follows: Plaintiff rents a rent-controlled half-apartment in New York City, affording him a substantial saving in the cost of accommodation when he travels from this Commonwealth to New York. In 1983, plaintiff was advised that the Mayor of New York City had announced that rent-controlled apartments might under certain circumstances be decontrolled if the tenant did not file New York state and city resident income tax returns. Pursuant to such advice, to protect his interest in his inexpensive accommodations, for some taxable years since that time plaintiff has voluntarily filed New York state and city resident income tax returns.

2. *Actions Hitherto Taken by Defendants Pursuant to the Policies and Practices Complained Of*

26. Pursuant to the policies and practices of the state of New York and of defendants as hereinabove described, defendants have denied the *bona fides* of plaintiff's change of domicil, and have harassed and threatened plaintiff and demanded taxes from him, in the following ways, among others:

27. Application of such policies and practices to plaintiff began with a telephone call from defendant Mehra to Paul Czarnowski, the accountant who advises and represents plaintiff with respect to New York tax

matters, seeking a meeting with respect to plaintiff's taxable year 1987.

28. At that time Czarnowski was suffering from a severe knee injury and was unable to meet with defendant Mehra. Defendant Mehra expressed indignation at Czarnowski's inability to meet with him, and sent to Czarnowski for plaintiff an elaborate, burdensome, and one-sided questionnaire evidently designed to demonstrate that plaintiff was a New York domiciliary.

29. Defendant Mehra thereafter held several telephone conversations with Czarnowski, insisting that plaintiff and/or Czarnowski meet with him in the Borough of Queens, a section of New York City known by defendant Mehra to be far remote from, and inconvenient to, Czarnowski's office in the Borough of Manhattan.

30. Czarnowski repeatedly requested that defendant Mehra meet with him and plaintiff at Czarnowski's office, pointing out that the relevant documentation was heavy and voluminous; that under such circumstances it was customary for auditors to examine it at the accountant's or the taxpayer's office, and that he, Czarnowski, was on crutches and that it would be difficult for him to carry bulky documentation to a remote location in Queens. Defendant Mehra refused this elementary courtesy and insisted that Czarnowski come to Queens.

31. Czarnowski accordingly met with defendant Mehra in Queens. He took with him various relevant documents supporting plaintiff's non-resident status, including, without limitation, credit card charges, utility bills, telephone bills, and other material bearing on the

number of days plaintiff had been present in New York not only during the year in question but during 1988 and 1989 as well. He reviewed such documentation with defendant Mehra for at least one-half of a full business day. Defendant Mehra asked that the documents be left with him. Czarnowski objected to doing so, since defendant Mehra could not guarantee their safety. He offered to defendant Mehra a private room at his own office for whatever period of time defendant Mehra might want to take, in order to examine this and other relevant documentation for as long, and in as great detail, as he might desire. Defendant Mehra undertook to arrange such a further meeting.

32. Notwithstanding defendant Mehra's undertaking, plaintiff, through Czarnowski, then received a notice assessing taxes for 1987 as a resident of the State of New York, without any further communication from defendant Mehra or any other representative of the State of New York. Such an event was unique in Czarnowski's more than 30 years of experience. He accordingly protested by telephone to defendant Zurlo, as defendant Mehra's superior. Defendant Zurlo asked whether there was any objection to further review of the documentation. Czarnowski responded that there was no objection, provided a competent and qualified person conducted the review.

33. This assessment was accordingly withdrawn, and thereafter defendant Mehra, accompanied by his supervisor, defendant Lin, spent at least one day and perhaps more at Czarnowski's office examining the documentation.

34. Thereafter, defendants Mehra and Lin told Czarnowski by telephone that plaintiff had been determined to be taxable as a resident for 1987, on the

basis that he had been present in the state for more than 183 days in that year while maintaining a "permanent place of abode" therein. At Czarnowski's request, defendants Mehra and Lin sent him their worksheets. Upon examination of these it transpired that defendants Mehra and Lin had systematically misinterpreted plaintiff's records, including listing all calls charged to plaintiff's New York telephone as showing that plaintiff was in New York on that day, even though plaintiff's telephone bills showed plainly that such calls had been made by credit card from locations outside New York.

35. Thereafter, plaintiff and Czarnowski met with defendants Brown (supervisor of defendant Lin), Lin, and Mehra in Queens, and pointed out the many errors committed by defendants Lin and Mehra. Defendants Lin and Mehra asked to return to Czarnowski's office to review the documents once again.

36. Such further review took place. On leaving, defendants Lin and Mehra conceded that plaintiff had not been in New York for anything approaching 183 days in 1987. When asked by plaintiff and Czarnowski if this did not dispose of the matter, they replied that they must discuss it with their superiors.

37. Subsequently, defendant Mehra telephoned Czarnowski and advised him that it had been now determined that plaintiff was domiciled in New York and, since he had concededly been in New York on more than 30 days in 1987, was taxable for that year as a resident on that basis. Thereafter, a formal notice of deficiency assessing New York State taxes for that year on a resident basis was served upon plaintiff, through Czarnowski, by mail.

38. Such assessment was issued, and the entire course of dealing leading up to it was conducted, in bad faith by defendants, with the intent to harass and badger plaintiff into paying taxes to New York on a resident basis, and thereby nullify plaintiff's exercise of the right secured to him by the constitution of the United States to change his domicil from the State of New York to this Commonwealth and maintain it here.

3. *Anticipated Continuation of Such Activities by Defendants*

39. Plaintiff reasonably expects that defendants will continue to apply the practices and policies herein complained of, not only to plaintiff's taxable year 1987 but to other taxable years; to his estate when that time comes; and to any gifts he may make in the meantime. Such expectation is based not only on the longstanding custom and practice of defendants, but on the issuance of "guidelines" by defendant Wetzler which promise to continue and intensify such activity, as is set forth in more detail hereinbelow.

40. On information and belief, defendant Wetzler, on or about February 28, 1993, admitted to a reporter of The New York Times, as reported in that newspaper on March 1, 1993, that he was "worried by a mountain of anecdotal evidence that the auditors are doing more to hurt than help the state's economy," because "out of anger or to make sure they are not considered residents, many people have closed bank and brokerage accounts; sold businesses in the state; stopped using New York professionals like accountants, doctors, and dentists; stopped giving to New York charities and politicians; limited trips to New York, and even avoided taking vacations in the state." A true and correct copy of the cited story from The New York Times is attached

hereto as Exhibit 1 and is incorporated herein by reference as fully as if herein set forth.

41. Effective February 17, 1993, defendant Wetzler issued guidelines for auditors, which, according to Exhibit 1, were "aimed at reining in overly zealous state tax agents who try to prove that people who say they live elsewhere are actually state residents — at least for tax purposes." A true and correct copy of such guidelines is attached hereto as Exhibit 2 and is incorporated herein by reference as fully as if herein set forth.

42. Such guidelines in fact do not "rein in" the auditors and other officials of the State of New York, including the state defendants herein, but rather formalize many of the intrusive and threatening practices employed for years to harass citizens who have sought to exercise their constitutional right to change their domicil. For example:

(a) Not only does the burden of proof continue to be imposed on the citizen to prove that he has exercised his constitutional right to change domicil, but he is still obliged to satisfy the auditors that he has done so by "clear and convincing evidence." Exhibit 2, pp. 2-3, 10, 44.

(b) Auditors are encouraged to intrude upon citizens by visiting and walking through their residences, and to obtain pictures or a videotape of the premises. Exhibit 2, pp. 12, 37.

(c) Auditors are encouraged to pry into citizens' private lives by making an "analysis of the taxpayer's family connections," ascertaining whether they have "retained deep and substantial ties with their children and

grandchildren," and concluding, if so, that "'quality time'" with them is "a central part of the taxpayer's lifestyle, and as a result there is not change in lifestyle or abandonment of the established domicile." Exhibit 2, p. 18.

(d) Auditors are instructed to pry into the citizen's "typical pattern and general lifestyle, hobbies, how time is spent on weekends, etc." Exhibit 2, p. 37.

(e) Auditors are encouraged to pry into whether individual items of citizens' personal property are "family heirlooms, treasured possessions, etc." Exhibit 2, p. 12.

(f) Auditors are encouraged to pry into what "pets, personal items or other sentimental possessions . . . the taxpayer holds 'near and dear to their heart,'" including "family heirlooms, works of art, collections of books, stamps and coins, and those personal items which enhance the quality of lifestyle," and even into whether they were "moved by a first rate carrier" or by U-Haul, demanding evidence in the form of bills of lading and insurance statements. Exhibit 2, pp. 16-17, 41.

(g) Auditors are directed to enquire of the citizen whether the citizen's children are receiving any grants, awards, or scholarships, and into whether there were "any special occasions celebrated during the year." Exhibit 2, p. 37.

(h) Auditors are instructed to scrutinize the citizen's cancelled checks for "such personal expenses as groceries, hairdressers, club dues, and entertainment." Exhibit 2, p. 40.

(*i*) Auditors are encouraged to inquire into the activities of citizens' domestic help. Exhibit 2, p. 15.

(j) Auditors are encouraged to question the size and value of the citizen's new home and former New York homes. Exhibit 2, p. 13.

(k) Auditors are encouraged to question whether citizens have listed their former New York homes at a reasonable price and the degree of activity citizens are devoting to sale of their former New York homes. Exhibit 2, p. 12.

(*l*) Although New York, and in particular New York City, are well known as commuter regions, where many scores of thousands of persons work in the city while living outside it, including scores of thousands who live in Connecticut, New Jersey, or Pennsylvania, auditors are directed to treat any involvement by a citizen in New York business activity as a "major factor in determining a domicile issue," to treat evidence showing "material participation" for federal income tax purposes as evidence of non-exercise by the citizen of his constitutional right to change domicil, and even to challenge the turning over of a family business to the next generation. Exhibit 2, pp. 15-16.

(m) Even where a citizen has maintained logs and diaries showing his presence in or absence from New York day by day, auditors are encouraged to disbelieve these and to demand corroborating evidence such as credit card receipts, utility bills, bank information, and telephone bills. Exhibit 2, pp. 18, 41.

(n) Auditors are encouraged to attempt to persuade citizens to claim New York domicil by pressing upon them the alleged advantages of certain tax deferrals or exclusions allowed to domiciliaries by New York with respect to gain from the sale of a New York residence. Exhibit 2, p. 14.

(o) Auditors are provided with a six-page "long-form questionnaire [which] is designed specifically for an individual where domicile is an issue which must be addressed during the audit," which "seek[s] information concerning all aspects of the taxpayer's involvement in New York's social, family, and business scene," and "may place a heavy burden on the taxpayer" but which is nevertheless not to "restrict the auditor's creativity." Exhibit 2. p. 36. Such questionnaire covers six pages, and focuses on information calculated to disprove the exercise by the citizen of his constitutional right to change domicil, with little attention to contrary factors. Exhibit 2, Appendix 3.

(p) Auditors are provided with summaries of 28 New York agency and court cases dealing with domicil and residence, in not more than four of which were the citizen's contentions upheld. Exhibit 2, Appendix 4.

43. Defendants Wetzler, Zurlo, Brown, Lin, and Mehra, and all other employees of the Department of Taxation and Finance of the State of New York, are bound by and will follow the guidelines aforesaid.

C. *The Effects and Threatened Effects of Defendants' Acts*

44. Plaintiff's freedom to change his domicil from the State of New York to the Commonwealth of Pennsylvania is a right and privilege of United States citizenship, and the constitution and laws of the United States secure to him the right and privilege to do so, and secure to him immunity from interference with, and harassment of his exercise of, such right and privilege.

45. Plaintiff is obliged to visit New York City from time to time on business and for medical reasons. Plaintiff's freedom to travel freely and without hindrance between the Commonwealth of Pennsylvania and the State of New York is a right and privilege of United States citizenship, and the constitution and laws of the United States secure to him the right and privilege to do so, and secure to him immunity from interference with, and harassment of his exercise of, such right and privilege.

46. The acts and threatened acts of defendants hereinabove set forth have deprived, are depriving, and unless relief is afforded by this honorable Court will continue to deprive plaintiff of such rights, privileges, and immunities, in at least the following respects, without limitation:

(a) Plaintiff has been, is being, and unless relief is afforded by this honorable Court will continue to be, subjected to harassment and intimidation designed to deprive him of such rights, privileges, and immunities.

(b) Plaintiff has been, is being, and unless relief is afforded by this honorable Court will continue to be in fact deprived of such rights,

privileges, and immunities, in that the exaction or attempted exaction from plaintiff, a non-domiciliary, of taxes which can only be imposed on domiciliaries deprives plaintiff of his constitutional right freely and without hindrance to change domicil, and the threat to impose such taxes upon plaintiff based upon travel between his domicil in the Commonwealth of Pennsylvania and the State of New York, and upon matters incident thereto, deprives plaintiff of his constitutional right freely and without hindrance to travel between such places.

47. The acts and threatened acts of defendants hereinabove set forth have caused, are causing, and unless relief is afforded by this honorable Court will continue to cause, harm and tortious injury in this Commonwealth and this county in at least the respects set forth in paragraph 4 hereinabove, without limitation.

VI.

The harm and injury inflicted and threatened to be inflicted upon plaintiff by the acts of defendants herein complained of are irreparable by a money judgment. Plaintiff has no adequate remedy at law or before any administrative agency to redress the harm and injury, and prevent the threatened harm and injury, herein complained of.

VII.

Plaintiff's domiciliary status, at issue in this proceeding, has an effect on the determination of taxes payable by him to the Commonwealth of Pennsylvania, in that the Commonwealth allows certain credits against its own taxes, including income taxes, for certain taxes, including income taxes, paid to New York. Accordingly,

the Attorney General is being served with a copy of this complaint pursuant to 42 Pa. Cons. Stat. Ann. § 7540(b).

VIII.

WHEREFORE, THE PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That this honorable Court take jurisdiction of this suit, and issue its process to the defendants, requiring them to appear and make answer to this complaint and abide by the decrees of this honorable Court or suffer a decree *pro confesso* to be issued against them.

2. That upon hearing, this honorable Court issue its decree declaring that plaintiff is, and at all times after 1978 has been, a domiciliary of the Commonwealth of Pennsylvania and not of the State of New York; and that efforts by defendants to exact taxes from plaintiff on the basis of plaintiff's alleged domicil in the State of New York for any taxable year after 1978 constitute deprivation of rights, privileges, and immunities secured to plaintiff by the constitution and laws of the United States, under color of the law and custom of the State of New York, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

3. That this honorable Court award to plaintiff, against defendants in their individual capacities, such damages as may to this honorable Court seem just and allowable, together with his costs of suit and a reasonable attorney's fee.

4. That this honorable Court retain jurisdiction of this suit.

AND PLAINTIFF PRAYS for such other, further, or different relief as he may be entitled to in the premises.

THADDEUS HOLT
Attorney Id. No. 43000
c/o Lamb, Windle & McErlane, P.C.,
24 East Market Street
P.O. Box 565
West Chester, Pennsylvania 19381
215-430-8000

PATRICK W. KITTREDGE
Attorney Id. No. 03556
Kittredge, Donley,
Elson, Fullem & Embick
421 Chestnut Street
Philadelphia, Pennsylvania 19106
215-829-9900

WILLIAM H. LAMB
Attorney Id. No. 04927
Lamb, Windle & McErlane, P.C.,
24 East Market Street
P.O. Box 565
West Chester, Pennsylvania 19381
215-430-8000

Attorneys for Plaintiff

November 5, 1993

(Exhibits not reproduced)

APPENDIX I

Material Required by Rule 14(1)(g)(i)

See Appendix G, Complaint, setting forth basis of personal jurisdiction; Appendix B, Order of the Trial Court, December 27, 1994, denying motion to dismiss for want of personal jurisdiction; Appendix C, Order of the Trial Court, June 11, 1996, denying motion for reconsideration of Order of December 27, 1994; Appendix E, Excerpts From Adjudication and Order Nisi of the Trial Court, January 20, 1999, reiterating holding as to personal jurisdiction; Appendix F, Final order of the Trial Court, July 19, 1999, denying post-trial motions; Appendix A, Opinion and Order of the Superior Court of Pennsylvania, March 23, 2000, reversing as to personal jurisdiction; Appendix G, Order of the Supreme Court of Pennsylvania Denying Leave To Appeal, February 6, 2001.